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Recommended Citation

Kamisar, Yale. "Kauper's 'Judicial Examination of the Accused' Forty Years Later—Some Comments on a Remarkable Article." *Mich. L. Rev.* 73 (1974): 15-38.

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KAUPER'S "JUDICIAL EXAMINATION OF THE ACCUSED"† FORTY YEARS LATER—SOME COMMENTS ON A REMARKABLE ARTICLE

Yale Kamisar*

FOR a long time before Professor Paul Kauper wrote "Judicial Examination of the Accused" in 1932, and for a long time thereafter, the "legal mind" shut out the de facto inquisitorial system that characterized American criminal procedure. Paul Kauper could not look away. He recognized the "naked, ugly facts" (p. 1224) and was determined to do something about them—more than thirty years before *Escobedo v. Illinois*¹ or *Miranda v. Arizona*.²

Kauper proposed that a suspect be brought before a judicial officer immediately upon arrest, without assistance of counsel; that the suspect be allowed to elect whether or not to speak at this appearance; but that (as he would be forewarned), if he chose to remain silent, his silence would be the subject of inference and comment at trial.³ The original, unexpurgated Kauper proposal

† Kauper, *Judicial Examination of the Accused—A Remedy for the Third Degree*, 30 MICH. L. REV. 1224 (1932) [hereinafter cited by page]. Professor Kauper's article is reprinted in full at pages 39-70 of this issue.—Ed.

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1. 378 U.S. 478 (1964).

2. 384 U.S. 436 (1966).

3. As Kauper pointed out, he was hardly the first to advocate judicial or judicially supervised interrogation as a remedy for the third degree. See authorities collected at p. 1240 n.81. The other proposals, however, differed significantly from Kauper's. For example, Judge Simeon Baldwin urged, "let there be no caution [by the magistrate] that [the suspect] need not answer, and no warning that he may be making evidence against himself." 6 A.B.A. Rep. 225, 238 (1883). Baldwin's proposal would in effect have substituted the "inherent pressures," *Miranda v. Arizona*, 384 U.S. 436, 468 (1966), of judicial interrogation for those of police interrogation. Similarly, the plan briefly considered by the American Law Institute in the 1920's would have authorized a magistrate to interrogate a suspect without advising him that he had a right to remain silent or that anything he said might be used against him, and would have provided further that if the suspect refused to answer any questions, "the magistrate in his discretion may commit him for contempt." ALI CODE OF CRIMINAL PROCEDURE 92, 101 (Prelim. Draft No. 5, 1927), abandoned in ALI CODE OF CRIMINAL PROCEDURE 26-27 (Tent. Draft No. 1, 1928). On the other hand, Chafee suggested vaguely that "perhaps even an examination before trial might be permitted if conducted by a responsible magistrate," without specifying how, if at all, the suspect could be made to talk and without indicating what advice, if any, the suspect should be given at this examination. See Chafee, *Compulsory Confessions*, 40 NEW REPUBLIC 266, 267 (1924). Others proposed simply that a suspect be afforded a prompt "opportunity" to make his statement before a magistrate "if he is willing to make one," but provided no sanction if the suspect chose to remain silent. See 2 J. WIGMORE, EVIDENCE § 851, at 199 (2d ed. 1923); *Outline of Code of Criminal*

would not, of course, pass constitutional muster today.⁴ But Kauper's failure to foresee the direction the Supreme Court would take in the 1960's is hardly surprising. What is surprising is that in the "stone age" of American criminal procedure—some four months before *Powell v. Alabama*,⁵ the first great right to counsel case, was argued in the Supreme Court, and some four years before *Brown v. Mississippi*,⁶ the first fourteenth amendment due process "coerced" confession case, was handed down—Kauper saw the issues so clearly, discussed them so cleanly, and resolved them so honestly.

Procedure, 12 A.B.A.J. 690, 692 (1926). Still others suggested changing the law so that a defendant may be "forced" to testify at his trial. See, e.g., Chafetz, *supra*, at 267; Irvine, *The Third Degree and the Privilege Against Self Crimination*, 13 CORNELL L.Q. 211, 216-17 (1928).

Moreover, in marked contrast to Kauper's elaborate consideration of the relevant issues, most of the other proposals were presented very summarily. This may even be said of the unembellished Wickersham Commission proposal. See NATIONAL COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT, REPORT ON LAWLESSNESS IN LAW ENFORCEMENT (1931) [hereinafter WICKERSHAM REPORT]. Not infrequently the proposals were simply "tossed out" in the course of a general diatribe against allegedly unrealistic courts. See, e.g., the quotations collected in ALI CODE OF CRIMINAL PROCEDURE 92-95 (Prelim. Draft No. 5, 1927).

Kauper's article, so far as I can tell, was the first systematic treatment of the problems raised by a judicially supervised interrogation procedure. Apparently Kauper was not only the first to articulate at considerable length the need for, desirability of, and historical support for such a procedure, but also the first to marshal, and to evaluate with any degree of thoroughness, the policy and constitutional arguments against such a procedure.

4. Constitutional deficiencies are absence of counsel and disclosure of the accused's silence at trial. However, provision of counsel would not necessarily destroy the effectiveness of Kauper's procedure if the suspect's refusal to answer questions at the judicial examination could be disclosed at trial. See text at notes 45-46 *infra*. Whether such disclosure would be constitutional is at first glance very doubtful, but on a second look, considering the many protective features a modernized version of Kauper's plan would offer, it is certainly arguable. See note 70 *infra*.

5. 287 U.S. 45 (1932). Professor Francis Allen notes that *Powell*, which marked "[the beginning of] the modern law of due process relating to criminal procedure," Allen, *The Supreme Court, Federalism, and State Systems of Criminal Justice*, 8 DE PAUL L. REV. 213, 223 (1959), and "the rise of Hitler to power in Germany occurred within the period of a single year. . . . [P]erhaps, in some larger sense the two events may be located in the same current of history. Both occurrences are encompassed in the crisis of individual liberty which has confronted the western world since the first world war." Allen, *The Supreme Court and State Criminal Justice*, 4 WAYNE L. REV. 191-92, 196 (1958).

Although *Powell* came to stand for the proposition that an indigent defendant had an absolute right to assigned counsel in capital cases, see *Hamilton v. Alabama*, 368 U.S. 52, 55 (1961); *Bute v. Illinois*, 333 U.S. 640, 676 (1948), as Justice Harlan maintained thirty years later, *Powell* could be plausibly read for the narrow proposition that only "under the particular facts there presented—the ignorance and illiteracy of the defendants, their youth, the circumstances of public hostility [and] that they stood in deadly peril of their lives"—[did a] state court [have] a duty to assign counsel for the trial as a necessary requirement of due process of law." *Gideon v. Wainwright*, 372 U.S. 335, 349-50 (1963) (concurring opinion), quoting *Powell v. Alabama*, 287 U.S. 45, 71 (1932). See generally Allen, 8 DE PAUL L. REV., *supra*, at 223-33.

6. 297 U.S. 278 (1936).

An eloquent voice protested in the 1960's that "reasonable men could hardly foresee that the provinces would be deemed delinquent in their due process for failing to take one great leap from the right to counsel at trial to a right to counsel before arraignment."⁷ But Kauper recognized that "another possible check on arbitrariness which suggests itself is to allow the prisoner the right to counsel during interrogation" (p. 1247), and conceded that "it may be questioned whether legislation would be valid which deprived the prisoner of the right to counsel at the interrogation before a magistrate" (p. 1249). Yet he concluded:

If time must be allowed until counsel is procured, the preliminary interrogation will lose its effectiveness. Its value depends upon interrogation immediately upon arrest. There is the additional objection that the attorney's mere physical presence will give the prisoner a moral support which will interfere with that psychic state which guarantees the effectiveness of the proposed interrogation. And the attorney will discourage spontaneity of responses by his client, urge him to be guarded in his replies, encourage him to fabricate a denial or alibi, and make vexatious objections to questions put by the magistrate, so that the procedure will be throttled at this point. It is submitted, therefore, that to grant to the prisoner the right to counsel during the interrogation will defeat the very purpose of the plan. [P. 1247.]

"Square recognition . . . of a privilege against self-incrimination at the pre-arraignment stage" did not occur until 1964,⁸ when the Court performed "what might have seemed to some a shotgun wedding of the privilege to the confessions rule";⁹ comment on a defendant's refusal to take the stand was not constitutionally banned until the following year.¹⁰ But Kauper conceded in 1932 that "there is good authority for the opinion that [his proposed plan] would violate the privilege" (pp. 1251-52). He recognized, too, "that the possibility of . . . comment [on the accused's refusal to speak at the judicial examination] brings a psychic pressure to bear on [him] impelling him to speak . . .; in fact this pressure is the very object of the provision" (p. 1251). But he took the position, as have distinguished commentators in our time,¹¹ that "considering the pur-

7. Traynor, *The Devils of Due Process in Criminal Detection, Detention, and Trial*, 33 U. CHI. L. REV. 657, 669 (1966).

8. Traynor, *supra* note 7, at 679, referring to *Malloy v. Hogan*, 378 U.S. 1 (1964).

9. Herman, *The Supreme Court and Restrictions on Police Interrogation*, 25 OHIO ST. L.J. 449, 465 (1964).

10. *Griffin v. California*, 380 U.S. 609 (1965).

11. See, e.g., W. SCHAEFER, *THE SUSPECT AND SOCIETY* 60, 63-71, 80 (1967); Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. CIN.

pose of the privilege and its history, . . . a threat of comment on the refusal of the accused to answer questions [should not] be deemed compulsion so as to vitiate a statute providing for magisterial interrogation" (p. 1255):

Under the proposed plan for interrogation the accused still has his election to speak or keep silent; he is not—as any other witness would be in the circumstances—committed for contempt for his refusal to speak. To use the constitutional language—he is not compelled to be a witness against himself. Insofar as his silence exposes him to an inference of guilt, he is merely subject to the effect of an ordinary rule of evidence applied in all other instances where appropriate. Drawing such an inference from a refusal to answer questions which a person would naturally answer if innocent is an inevitable logical process based on human experience and common sense. [P. 1252.]

Although the conventional wisdom of his time, and a long time thereafter, was that "the fact that the prisoner cannot be [judicially] questioned stimulates [police and prosecutors to] search for independent evidence,"¹² Kauper understood that often the only thing stimulated by the inability of judicial officers to question a prisoner was questioning by police and prosecutors before the proceedings became judicial, and that often the availability of the privilege once the prisoner reached the safety of the courtroom only furnished his captors with an additional incentive to prove the charges against him by introducing statements he made before he left the station house:

[N]o *legal* means is available for confronting the accused with the charge against him, challenging him to explain the evidence pointing to his guilt, interrogating him as to incriminating circumstances, and producing in evidence against him at the trial his refusal to explain or answer.¹³ . . . It is not strange that judges are reluctant

L. REV. 671, 700, 714 (1968). Cf. Traynor, *supra* note 7, at 676. See also Griffin v. California, 380 U.S. 609, 622 (1965) (Stewart & White, JJ., dissenting): "The Model Code of Evidence, and Uniform Rules of Evidence both sanction [comment on the defendant's failure to testify]. The practice has been endorsed by resolution of the American Bar Association and the American Law Institute and has the support of the weight of scholarly opinion."

12. 1 J. STEPHEN, HISTORY OF THE CRIMINAL LAW OF ENGLAND 441-42 (1883).

13. Kauper noted that the Wickersham Commission had[®] concluded, without elaboration, that "the best remedy" for the third degree "would be *enforcement of the rule* that every person arrested charged with crime should be forthwith taken before a magistrate, advised of the charge against him, given the right to have counsel and then *interrogated by the magistrate*" (p. 1238, quoting WICKERSHAM REPORT, *supra* note 3, at 5 (emphasis by Kauper)). But he viewed the Commission's conclusion as a misstatement of existing law with respect to preliminary examination, for at that stage "no judicial pressure of any kind can be brought to bear on the accused to make him speak" (p. 1238).

to compel the police, whose coercive methods are productive of confessions, to observe the rule requiring prompt presentment before a magistrate in whose presence the prisoner can bask in privileged silence.

. . . .
 . . . From the viewpoint of police psychology it appears that inauguration of a scheme of magisterial interrogation will greatly weaken the police motive for private interrogation since that motive will find vicarious expression in a substituted device. Viewing the problem historically, Dean Pound ascribes the extra-legal development of the "unhappy system of police examination" in the United States to the sloughing off by justices of the peace of their police powers, including examination of the accused, thereby leaving "a gap which in practice had to be filled outside of the law." The proposed plan would fill the gap which resulted from the differentiation in function between magistrate and police with the effect of forcing the police to adopt the system of extra-legal interrogations. It would vest the power of interrogation in officers who are better qualified to exercise the power of interrogation fairly and effectively. [Pp. 1238-39, 1241.]

Kauper discussed the issues and spelled out his remedy with remarkable clarity and candor. These may be great scholarly virtues, but they proved to be fatal "political" weaknesses. So long as interrogations remained unregulated and unscrutinized in the back room of the police station, the "legal mind," which had grown uncritically accustomed to them in that setting, was left unmoved and uninterested.¹⁴ But once Kauper, and others advocating similar plans,

See also the reaction of Kauper's teacher and future colleague, John Barker Waite: "Unfortunately for the helpfulness of [the Commission's] suggestion, there is no such rule to be enforced. . . . [T]he Commission seems to have forgotten that [the examination before the magistrate] is not an interrogation of the accused [but] a mere review of the evidence already accumulated against him to see whether it warrants holding him for further proceedings. . . . [A]fter the evidence against the accused has been presented [against him, most state statutes provide that] the accused shall be 'afforded opportunity' to make a statement if he so desires. In not half a dozen states is the magistrate authorized to examine the suspect himself, and in those he must first warn the accused of the danger of answering, and must tell him that he need not answer if he does not wish." Waite, *Report on Lawlessness in Law Enforcement*, 30 MICH. L. REV. 54, 58 (1931).

Kauper recognized the possibility that the Wickersham Commission's conclusion was a suggested *reform* of then prevailing law, not a statement that the *existing rules* be enforced. However, since all of the other requirements mentioned in the Commission's proposal "are generally recognized by rules of law now existent, the coupling of these requirements with a non-existent requirement of interrogation by the magistrate is at best seriously misleading and objectionable on that ground" (p. 1238 n.76).

14. Even if the "legal mind" perceived any self-incrimination problems, it found comfort in the notion (which prevailed until the 1960's) that compulsion to testify meant legal compulsion only. Since the "subject" of police interrogation is threatened with neither a perjury charge for testifying falsely nor contempt for refusing to

"formalized" and "judicialized" the interrogation proceedings, the "legal mind" became aroused. Thus, although Kauper-type remedies offered an arrestee significantly more protection than did the typical police interrogation, at least until the eve of *Miranda*, they were beaten down—several decades before *Miranda*—to the accompaniment of cries that they were "opposed to our traditions of fair play," "contrary to the basic notions of Anglo-American procedure," and violative of the privilege against self-incrimination.¹⁵ No opponent of these proposals, however, satisfactorily answered Kauper, who pointed out:

[E]ven by the most severe critics of modern police methods no claim has been made that private police interrogation of the accused intended to elicit a confession violates his right to counsel. A voluntary confession to the police is always admissible in evidence; where a confession is excluded it is not on the ground that the accused is denied the right to counsel but on the ground that the confession is involuntary. The same principle applies to confessions made to the magistrates. There is no reason why an interrogation aimed at obtaining a confession should be transformed in constitutional character merely by the fact that it is conducted with proper safeguards and by an officer who, on other occasions, exercises strictly judicial powers.

. . . .
[C]ompulsory interrogation is forbidden on all occasions. It matters not whether it be interrogation at the trial, at the preliminary hearing, or at some police or magisterial inquisition prior to either. . . . It is submitted that we must differentiate carefully between interrogation *simpliciter* and interrogation under compulsion, and that the former does not constitute a violation of the constitutional privilege. . . . [N]o one has ever suggested that interrogation by the police of a suspect was unconstitutional, unless it was accompanied by physical violence or other unlawful pressure. It is inconceivable that express statutory authorization of magisterial interrogation designed to eliminate the abuses of police methods should be regarded as constitutionally more objectionable. [Pp. 1250, 1251.]

On the eve of *Miranda* Chief Justice Traynor observed: "The

testify at all, he is not being "compelled" to be a "witness against himself" within the meaning of the privilege. See generally Kamisar, *A Dissent from the Miranda Dissents: Some Comments on the "New" Fifth Amendment and the Old "Voluntariness" Test*, 65 MICH. L. REV. 59, 65, 77-83 (1966). One hopes that this contention was made for the last time in the *Miranda* oral arguments. See Unofficial Transcript of Oral Arguments in *Miranda* and Companion Cases, reprinted in Y. KAMISAR, W. LAFAYE & J. ISRAEL, *MODERN CRIMINAL PROCEDURE* 538 (4th ed. 1974).

15. See generally Kamisar, *Equal Justice in the Gatehouses and Mansions of American Criminal Procedure*, in Y. KAMISAR, F. INBAU & T. ARNOLD, *CRIMINAL JUSTICE IN OUR TIME* 21-24 (A. Howard ed. 1965).

Fifth Amendment has long been the life of the party in judicial or legislative proceedings, but it has had no life it could call its own in the pre-arraignment stage. Prosecutors seemed disposed to live happily ever after with this double standard. . . . Did we or did we not believe in the privilege against self-incrimination? There was never a real confrontation of the question so long as there was a double standard of the privilege."¹⁶ Kauper's article, of course, was a notable exception. Indeed, he confronted the question so honestly and openly that it hurt too much.

Traynor continued:

Although we took it for granted that suspects did incriminate themselves at the prearrest stage in fear or ignorance, so that in the courtroom they were already damned by their own admissions, we guarded their privilege in court with great ceremony. There they could keep their golden silence. The gold standard began to appear questionable only when it threatened to become a single standard, applicable at the prearrest stage as well as in court. One seldom heard, however, that we should give thought to going off the gold standard by revising the Fifth Amendment to permit some degree of self-incrimination in open procedures, whether at the trial or pretrial stage. . . . [However], [s]uch a procedure was suggested by Kauper [in 1932] and Pound [in 1934].¹⁷

Kauper's article cannot be ripped from the context and the needs of his time. In the spring of 1932 the Court had not yet suggested that defendants in a capital case were denied due process when a state refused them the aid of counsel; had not yet banned "dry run" hangings, beatings, and other crude practices on the part of state officers; had not yet taken the first steps in "a movement toward new rights in a field where none existed before."¹⁸ At the time Kauper advocated his plan he certainly had "reasonable

16. Traynor, *supra* note 7, at 674.

17. *Id.* at 674-75 & n.78. One may fairly say, however (and find much support for saying it in this very article by Traynor), that in his time Professor Kauper was not asking that the fifth amendment be "revised." See generally Breitel, *Criminal Law and Equal Justice*, 1966 UTAH L. REV. 1, 16; Hofstadter & Levittan, *Lest the Constable Blunder: A Remedial Proposal*, 20 RECORD OF N.Y.C.B.A. 629, 638 (1956). Cf. text at notes 37-44 *infra*.

As late as 1964 the courts were still divided on the constitutionality of comment upon silence at trial. See Note, *Procedural Protections of the Criminal Defendant*, 78 HARV. L. REV. 426, 448 (1964). Moreover, although it is no easy task, one may distinguish between comment on failure to testify at trial, banned by *Griffin v. California*, 380 U.S. 609 (1965); comment at trial on the defendant's silence during secret, unsupervised police interrogation, apparently condemned by *Miranda v. Arizona*, 384 U.S. 436, 468 n.37 (1966); and comment at trial on the defendant's refusal to answer questions put to him by a magistrate, or by law enforcement officers in the presence of a magistrate, prior to trial. See note 70 *infra*.

18. Breitel, *supra* note 17, at 16.

confidence" in its constitutionality.¹⁹ Moreover, Kauper's article was not as ambitious as the American Bar Association's *Standards for Criminal Justice*, the American Law Institute's *Model Code of Pre-Arraignment Procedure*, or even *Miranda*. It was, after all, only a remedy for the "third degree." And, as Kauper put it, "[w]hen the worst has been said about magisterial interrogation, its vices do not equal those of present police third-degree methods" (p. 1245).

The de facto inquisitorial system "had become so widespread and intrenched by [the early 1930's] that even most of its critics despaired of completely uprooting it in the foreseeable future."²⁰ Thus, Zechariah Chafee, co-author of the famous report to the Wickersham Commission on "the third degree," warned:

It is hard enough to prevent policemen from using physical violence on suspects; it would be far harder to prevent them from asking a few questions. We had better get rid of the rubber hose and twenty-four-hour grillings before we undertake to compel or persuade the police to give up questioning altogether. . . .

. . . . The third degree is deeply rooted in official habits in many cities, and is not likely to disappear until the officials have been persuaded that it is bad and unnecessary.²¹

Kauper argued persuasively that "[i]f in the greater number of instances police voluntarily took the prisoner to a magistrate . . . for interrogation, police habits would be formed which would have a cumulative effect in undermining the third degree as a police institution" (p. 1243). Furthermore, "in evaluating the probable effectiveness of a system allowing magisterial interrogation, weight must be attached to the effect of the existence of such procedure on the attitude of prosecutor, judge, and magistrate toward third degree practices" (p. 1243). Moreover, "the proposed plan may be effective in helping to crystallize public opinion against the present system of police interrogation. The failure of the public to become aroused except momentarily [over reports of police lawlessness] may be attributed in part to public acquiescence in police methods as supplying a need which our formal procedure does not satisfy" (p. 1244 n.89).

I hasten to add that even after forty years—and thousands of

19. Friendly, *supra* note 11, at 713 n.180.

20. Kamisar, *supra* note 14, at 87.

21. Chafee, *Remedies for the Third Degree*, ATLANTIC MONTHLY, Nov. 1931, at 626, 630.

pages of Supreme Court opinions, law review articles, empirical studies, and model codes—one need not be overly defensive about the Kauper proposal. If one were to revise it in light of subsequent developments and the great dialogue they stimulated, the “modernized” version would present an attractive alternative to the *Miranda* model.

Such revisitation and revision of the old Kauper plan has in fact occurred—most notably by two of the most eminent critics of *Escobedo* and *Miranda*, Justice Walter Schaefer and Judge Henry Friendly.²² A modernized version, based largely on their writings, might take approximately the form of the five provisions that follow:

1. *A person taken into custody because of, or charged with, a crime to which an interrogation relates, may be questioned only in the presence of and under the supervision of a judicial officer.*²³

2. *The person shall immediately (that is, as soon as humanly possible) be brought before a judicial officer who shall, before questioning begins, determine the existence of the grounds for detention or arrest.*²⁴

3. *The judicial officer shall give the person the familiar Miranda warnings and, in addition, inform him that if he is subsequently*

22. Although arguably comment at trial upon a suspect's silence during the judicially supervised interrogation might be permitted without amending the privilege against self-incrimination, see note 70 *infra*, both proponents of the modern plan assume the need for, and propose, a constitutional amendment. See W. SCHAEFER, *supra* note 11, at 78, 80; Friendly, *supra* note 11, at 721-22. Judge Friendly's article (which also treats many other aspects of the fifth amendment) is a self-styled “endorsement” of Justice Schaefer's proposal for judicially supervised interrogation by the police, Friendly, *supra*, at 713, but it also constitutes a valuable clarification and embellishment of the Schaefer proposal. See also Hofstadter & Levittan, *supra* note 17, at 630, 635-36; Note, *supra* note 17. Hofstadter and Levittan propose police questioning in the presence of a magistrate, but would not allow comment at trial upon a suspect's refusal to speak in the presence of the magistrate. Apparently the authors are content to rely on the assumption that “suspects frequently have a compulsive need to speak; certainly they would do so before a magistrate as freely as before the police.” Hofstadter & Levittan, *supra*, at 636.

23. “An amendment permitting interrogation before a magistrate would not preclude earlier questioning conforming to *Miranda* although a state would be free to choose to prohibit this.” Friendly, *supra* note 11, at 714 n.185.

The proponents of the plan recognize that “the system would be fully effective only if an adequate supply of magistrates and defenders was provided on a 24-hours-a-day, 7-days-a-week basis,” but “failure to achieve perfection is scarcely a sufficient objection unless something better is in sight.” Friendly, *supra*, at 714-15. See also W. SCHAEFER, *supra* note 11, at 78.

24. On the need for, and the constitutional right to, a prompt post-arrest judicial determination of probable cause, see Y. KAMISAR, W. LAFAVE & J. ISRAEL, *supra* note 14, at 286-88. Unlike French procedure, judicial examination under Kauper's proposal “should be limited to the specific charge for which the accused is under arrest . . . [M]uch prolonged interrogation by the police results from the attempt to justify an unwarranted arrest. That motive would be absent in the case of magisterial questioning” (p. 1248).

prosecuted his refusal to answer any questions will be disclosed at the trial.²⁵

"Enough has been disclosed in reported decisions to establish incontrovertibly the necessity for supervision" of police questioning.²⁶ But *Miranda* is satisfied even if the police conduct the waiver transaction and the subsequent interrogation *in secret*.²⁷ Putting aside the secrecy point for now,²⁸ it would seem preferable, where practicable, to bring the suspect before a judicial officer, "who can better bring home to him the seriousness of his decision to waive."²⁹

25. In order to "heighten the importance of this sanction," Judge Friendly "would leave the law that the court cannot comment on the defendant's failure to take the stand at trial where the Supreme Court has placed it. Otherwise defense counsel, knowing that his client may not testify, may think little would be lost by an additional comment on an earlier refusal to answer." Friendly, *supra* note 11, at 714.

26. W. SCHAEFER, *supra* note 11, at 38.

27. *Miranda* does state that "[i]f the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his [rights]," and that "[s]ince the State is responsible for establishing the isolated circumstances under which the interrogation takes place and has the only means of making available corroborated evidence of warnings given during incommunicado interrogation, the burden is rightly on its shoulders." *Miranda v. Arizona*, 384 U.S. 436, 475 (1966) (emphasis added). This language strongly suggests that, at least where feasible, law enforcement officers must stenographically or electronically record the warnings given to the suspect, as well as his response, so that they may be played back or shown to the trial court. See, e.g., Thompson, *Detention After Arrest and In-Custody: Some Exclusionary Principles*, 1966 U. ILL. L.F. 390, 421. Nevertheless, although "[i]t is obvious that reliance upon the oral testimony of the officer to establish the conditions of interrogation will often lead to a swearing contest . . . which the suspect will rarely win, whether he is telling the truth or not," MODEL CODE OF PRE-ARREST PROCEDURE, Commentary at 140 (Tent. Draft No. 6, 1974), "most courts have held that the testimony of an officer that he gave the warnings is sufficient, and need not be corroborated." *Id.*

It is too much to expect the present Court to "rescue" *Miranda* from the niggardly interpretations of the lower courts. Although many thought language in *Miranda* resolved the matter the other way, the "new" Court has held that statements obtained from a suspect in violation of *Miranda* may be used to impeach him if he subsequently takes the stand in his own defense. *Harris v. New York*, 401 U.S. 222 (1971), bitterly criticized in Dershowitz & Ely, *Harris v. New York: Some Anxious Observations on the Candor and Logic of the Emerging Nixon Majority*, 80 YALE L.J. 1198 (1971). And the Court may yet hold (but one hopes will not, see note 70 *infra*) that a suspect's silence during police custody may be used for impeachment purposes. See, e.g., *United States ex rel. Burt v. New Jersey*, 475 F.2d 234 (3d Cir.), cert. denied, 414 U.S. 938 (1973) (Douglas, Brennan & Marshall, JJ., dissenting). I doubt that *Miranda* will be overruled, but see F. INBAU, J. THOMPSON, J. HADDAD, J. ZAGEL & G. STARKMAN, *CASES AND COMMENTS ON CRIMINAL PROCEDURE* 355 (1974). If *Miranda* does remain on the books, however, it will probably be only because easy waiver and other eroding interpretations have sufficiently soothed its critics on the Court.

28. See text at notes 51-57 *infra*.

29. MODEL CODE OF PRE-ARREST PROCEDURE, Commentary at 40 (Study Draft No. 1, 1968).

While the judicial officer's advice is not likely to be as emphatic as the defense lawyer's, it is likely to be clearer and more meaningful than the police officer's.

To the extent that "any lawyer worth his salt"³⁰ will tell his client to "keep quiet," it is no less true that any police officer "worth his salt" will be sorely tempted to get the suspect to talk. Can we really demand of our police that they unbegrudgingly and unequivocally explain to a suspect the very means he may use to frustrate them? As Dean Edward Barrett once asked: "[I]s it the duty of the police to persuade the suspect to talk or persuade him not to talk? They cannot be expected to do both."³¹ Chief Judge Bazelon has put it less kindly: A system that places reliance on police warnings "place[s] a mouse under the protective custody of the cat."³²

A system based on judicial warnings has obvious practical limitations. But as more and more courts hold, in effect, that police questioning outside the station house is not "custodial,"³³ a system of

30. *Watts v. Indiana*, 338 U.S. 49, 59 (1949) (Jackson, J., concurring and dissenting).

31. Brief of Edward L. Barrett, Jr., as amicus curiae at 9, *People v. Dorado*, 62 Cal. 2d 338, 398 P.2d 361, 42 Cal. Rptr. 169 (1965) (on rehearing).

32. Letter from Chief Judge David L. Bazelon to Professor Herbert Wechsler, Director of the American Law Institute, Nov. 16, 1965, quoted in W. SCHAEFER, *supra* note 11, at 91 n.77.

33. See cases collected in F. INBAU, J. THOMPSON, J. HADDAD, J. ZAGEL & G. STARKMAN, *supra* note 27, at 401-04; Y. KAMISAR, W. LAFAVE & J. ISRAEL, *supra* note 14, at 580-82. Whether or not *Miranda* applies to "street encounters" was once a lively issue. Compare LaFave, "Street Encounters" and the Constitution: *Terry*, *Sibron*, *Peters*, and *Beyond*, 67 MICH. L. REV. 39, 95-106 (1968), with Kamisar, "Custodial Interrogation" Within the Meaning of *Miranda*, in CRIMINAL LAW AND THE CONSTITUTION 335 (Inst. Cont. Legal Educ. ed. 1968). See also Graham, *What Is "Custodial Interrogation"?: California's Anticipatory Application of Miranda v. Arizona*, 14 UCLA L. REV. 59, 78-92 (1966); Pye, *Interrogation of Criminal Defendants—Some Views on Miranda v. Arizona*, 35 FORDHAM L. REV. 199, 212 (1966). Today, however, if "custody" within the meaning of *Miranda* exists outside of the station house, it does so only in "special circumstances," such as where the police have resorted to extraordinarily coercive measures (e.g., where they have arrested a suspect at gun point or forcibly subdued him) or engaged in plainly evasive tactics (e.g., where the ride to the station house rivals that "supposedly taken by the driver with a gullible foreigner in his cab," Friendly, *supra* note 11, at 715).

That the present Supreme Court will interpret "custody" or "custodial" as have most lower courts is evidenced by its discussion of the "consent search" in *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973). Justice Stewart observed for a 6-3 majority:

[I]t would be thoroughly impractical to impose on the normal consent search the detailed requirements of an effective warning. Consent searches are part of the standard investigatory techniques of law enforcement agencies. They normally occur on the highway, or in a person's home or office, and under informal and unstructured conditions. . . . [T]hese situations are . . . immeasurably far removed from "custodial interrogation," where, in *Miranda* . . ., we found that the Constitution required certain now familiar warnings In this case [the

judicial warnings (and/or electronic or stenographic recordings of these warnings and the ensuing proceedings³⁴) becomes increasingly practicable.

A word about the substance of the warnings. Kauper, as we have seen, balked at extending the right to counsel to judicially supervised interrogation. He did so in part because he thought such a requirement would substantially impair—certainly in the eyes of the police and the public—the effectiveness of the substitute he was offering for the prevailing illegal interrogation, and in part because such a requirement seemed neither “fair” nor “feasible” in the light of “then existing values and capabilities.”³⁵ Kauper’s concern about the delay until counsel was procured—the first objection he raised to allowing the prisoner the right to counsel during magisterial interrogation³⁶—must have been a weighty one in the pre-public defender days. As Chief Judge Haynsworth has said:

As our legal resources grow, there is a correlative growth in our ability to implement basic notions of fairness. Few of the concepts of due process entertained today were born full blown. They grew. The transition from *Betts v. Brady*³⁷ to *Gideon v. Wainwright*³⁸

“consented” search of a car stopped by officers for traffic violations], there is no evidence of any inherently coercive tactics—either from the nature of the police questioning or the environment in which it took place. Indeed, *since consent searches will normally occur on a person’s own familiar territory, the specter of incommunicado police interrogation in some remote station house is simply inapposite*. There is no reason to believe under circumstances such as are present here, that the response to a policeman’s question is presumptively coerced; and there is, therefore, no reason to reject the traditional test for determining the voluntariness of a person’s responses. *Miranda*, of course, did not reach investigative questioning of a person not in custody, which is most directly analogous to the situation of a consent search, and it assuredly did not indicate that such questioning ought to be deemed inherently coercive.

412 U.S. at 231-32, 247 (emphasis added).

Justices Stewart and White, the two *Miranda* dissenters still on the Court, have consistently taken the view in dissenting opinions that *Miranda* was designed “to guard against what was thought to be the corrosive influence of practices which station house interrogation makes feasible,” *Orozco v. Texas*, 394 U.S. 324, 329 (1969) (White & Stewart, JJ., dissenting), and that its rationale “has no relevance to inquiries conducted outside the allegedly hostile and forbidding atmosphere surrounding police station interrogation of a criminal suspect.” *Mathis v. United States*, 391 U.S. 1, 8 (1968) (White, Harlan & Stewart, JJ., dissenting).

34. See text at notes 47-57 *infra*.

35. “Due process cannot be confined to a particular set of existing procedures because due process speaks for the future as well as the present, and at any given time includes those procedures that are fair and feasible in the light of then existing values and capabilities.” Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 6 (1956).

36. See text preceding note 8 *supra*.

37. 316 U.S. 455 (1942).

to *Argersinger v. Hamlin*³⁹ is an example. The Bar is large enough and strong enough now to meet the requirements of *Gideon* and *Argersinger*; it well may not have been even a few years ago.⁴⁰

A close student of the right to counsel problem has suggested that the difference between Justices Black and Frankfurter in the 1942 *Betts* case may "have come down to a question of timing."⁴¹ Frankfurter might have felt that "the country was not ready for a universal requirement of counsel in serious criminal cases [not even at the trial stage]; the bar was not prepared for such a burden; the states would have resisted, and the decision would have been widely ignored."⁴² What, then, might be said of the dark days before *Powell v. Alabama*⁴³ and *Johnson v. Zerbst*?⁴⁴

The right to counsel at a judicially supervised interrogation is surely "fair" and "feasible" today. And it is unlikely that such a safeguard would defeat the purpose of Kauper's proposal. "[A]ny lawyer worth his salt" [would] have to reflect on the damage his client might suffer from having his refusal to answer disclosed at the trial."⁴⁵ Moreover, a lawyer would have to consider that any story that his client was able to produce immediately after arrest and that the police could not disprove in their investigations would be more convincing than his trial testimony weeks or months later, after he had had ample opportunity to prepare the most plausible defense.⁴⁶

4. *A complete written record shall be kept of the judicial examination; the information of rights, any waiver thereof, and any questioning shall be recorded upon a sound recording device; and the suspect shall be so informed.*

Kauper made plain that "a complete record should be kept of

38. 372 U.S. 335 (1963).

39. 407 U.S. 25 (1972).

40. *Moffit v. Ross*, 483 F.2d 650, 655 (4th Cir. 1973) ("equality" principle requires appointment of counsel for discretionary appeals and applications for review in U.S. Supreme Court), *rev'd.*, 417 U.S. 600 (1974).

41. A. LEWIS, *GIDEON'S TRUMPET* 221 (1964). *But see* Kamisar, Book Review, 78 HARV. L. REV. 478, 479 (1964).

42. A. LEWIS, *supra* note 41, at 221.

43. 287 U.S. 45 (1932). *See* note 5 *supra* and accompanying text.

44. 304 U.S. 458 (1938).

45. *Friendly*, *supra* note 11, at 714, *quoting* *Watts v. Indiana*, 338 U.S. 49, 59 (1949) (Jackson, J., concurring and dissenting).

46. *See* Note, *supra* note 17, at 446, 447.

the interrogation" (p. 1248)⁴⁷ and that the suspect should be informed that "the whole record of the interrogation will go to the trial court" (p. 1240). I am confident that if audio or video tape had been available at the time, he would have required that the judicial examination be so recorded. This feature of the Kauper plan underscores a major weakness of *Miranda*, at least as interpreted by the lower courts.⁴⁸

Allowing the police to give legal advice to, and obtain "waivers" from, suspects outside the presence of any judicial officer is troublesome enough. It seems inconsistent with *Miranda's* reliance on the analogy of the trial⁴⁹ and with the police function.⁵⁰ The problem is aggravated when, even though feasible, no stenographic transcript (let alone an electronic recording) of the "waiver transaction" need be made; when no disinterested observer (let alone a judicial officer) need be present; when—as most lower courts have held—the police officer's disputed and uncorroborated recollections of the "waiver" event suffice.⁵¹ Thus, a cogent criticism of the old "voluntariness" test applies to *Miranda* as well:

No other case comes to mind in which an administrative official is permitted the broad discretionary power assumed by the police interrogator, together with the power to prevent objective recordation of the facts. . . . It is secrecy, not privacy, which accounts for the absence of a reliable record of interrogation proceedings in a police station. If the need for some pre-judicial questioning is assumed, privacy may be defended on grounds of necessity; secrecy cannot be defended on this or any other ground.⁵²

Lack of judicial supervision or objective recordation raises doubts not only about the validity of the waiver, but about the propriety of the post-waiver proceedings as well. Once the suspect agrees to answer questions (as he often will, or at least as the police

47. See also Pound, *Legal Interrogation of Persons Accused or Suspected of Crime*, 24 J. CRIM. L. & CRIMINOL. 1014, 1017 (1934), proposing "legal examination" of suspects before a magistrate and "provision . . . for taking down the evidence so as to guarantee accuracy. As things are, it is not the least of the abuses of the system of extralegal interrogation that there is a constant conflict of evidence as to what the accused said and as to the circumstances under which he said or was coerced into saying it."

48. See note 27 *supra*.

49. See MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE, Commentary at 39-40 (Study Draft No. 1, 1968).

50. See text at notes 29-32 *supra*.

51. See note 27 *supra*.

52. Weisberg, *Police Interrogation of Arrested Persons: A Skeptical View*, in POLICE POWER AND INDIVIDUAL FREEDOM 153, 180 (C. Sowle ed. 1962).

will often persuade the trier of fact that he did), may the police display apparent sympathy, show the suspect incriminating physical evidence, inform him that an accomplice is also being questioned, pretend that the accomplice has already confessed, or understate the seriousness of the suspect's situation (by, for example, withholding information that the victim of his assault has died)?⁵³ It is bad enough that the legality of the kinds of cajolery to which the police may resort following warnings and a waiver, is, at this late date, "largely unresolved."⁵⁴ Worse—indeed, indefensible—is that the courts still have to evaluate these post-waiver interrogation techniques not in the light of who said *exactly what, precisely how*, but "in the dark of what might or might not have happened."⁵⁵

There are few dissents, if any, from the view that one or more police officers (and there are often more than one) usually fare better in a "swearing contest" than does the lone defendant. But not *all* defendants make poor witnesses. Nor do *all* police officers cut impressive figures in the courtroom, instilling confidence in the trier of fact. I share the view that most trial judges are "functionally and psychologically allied with the police,"⁵⁶ but not all judges are fungible. Those who sit on most of our large urban courts come increasingly (albeit still disproportionately) from all social strata and all types of practice—with different predispositions.

53. In F. INBAU & J. REID, *CRIMINAL INTERROGATION AND CONFESSIONS* 1 (2d ed. 1967), Professor Inbau and Mr. Reid take the position that "all but a very few of the interrogation tactics and techniques presented in our earlier [pre-Miranda] publication are still valid if used after the recently prescribed warnings have been given to the suspect under interrogation, and after he has waived his [rights]." Thus, "aside from . . . a prescription of the steps that must be taken to comply with *Miranda*, the [new Inbau & Reid edition] seems very close to the version that vented Chief Justice Warren's judicial ire" Broderick, Book Review, 53 CORNELL L. REV. 737, 741 (1968). *Miranda*, however, "did not condemn any specific techniques as such or hold that evidence obtained by use of them would be inadmissible. Reliance was placed on warning and counsel to protect the suspect." Elsen & Rosett, *Protections for the Suspect Under Miranda v. Arizona*, 67 COLUM. L. REV. 645, 667 (1967).

54. H. UVILLER, *THE PROCESS OF CRIMINAL JUSTICE: INVESTIGATION* 569 (1974). Professor Uviller adds: "Oddly, the few [post-Miranda] lower court decisions addressing deception in interrogation seem reluctant to forbid all forms of misrepresentation, particularly where the deception is neither shocking nor of the sort which creates the hazard that the innocent suspect might be induced to confess falsely." *Id.* Cf. *Frazier v. Cupp*, 394 U.S. 731 (1969), sustaining the admissibility of a confession in a pre-Miranda case although the police interrogator had falsely told the defendant that a co-defendant had confessed and had sympathetically suggested that the victim had started a fight by making homosexual advances.

55. Traynor, *supra* note 7, at 678.

56. Amsterdam, *The Supreme Court and the Rights of Suspects in Criminal Cases*, 45 N.Y.U. L. REV. 785, 792 (1970), in *THE RIGHTS OF AMERICANS* 401, 408 (N. Dorsen ed. 1971).

Some are highly skeptical of the police. Some, as my prosecutor friends insist, may even be downright hostile. Thus judicial supervision and recording of police interrogations may also redound to the benefit of the police by aborting dishonest claims of police intimidation or deception.⁵⁷

I am aware that the *Miranda* Court was probably affected by cries of powerful voices to "go slow," and troubled by cries of powerful voices that it had already gone too far. Indeed, I suspect that one or two of the Justices who made up the five-to-four *Miranda* majority seriously considered turning back. I realize, too, although one would gain little inkling of it from the hue and cry that greeted that much-maligned case, that *Miranda* marked a "compromise" between the old "voluntariness" test (and the objectionable police interrogation tactics it permitted in fact) and extreme proposals that—as the fear (or hope) was expressed at the time—would have "killed" confessions. On the eve of *Miranda* there may have been reason to believe that "the doctrines converging upon the institution of police interrogation [were] threatening to push on to their logical conclusion—to the point where no questioning of suspects [would] be permitted,"⁵⁸ but *Miranda* fell well short of that point.

Miranda did not, and did not try to, "kill" confessions. It left the police free to hear and act upon "volunteered" statements, even though the "volunteer" had been taken into custody and neither knew nor was informed of his rights to counsel and to remain silent;⁵⁹ it allowed the police to conduct "[g]eneral on-the-scene

57. Hofstadter & Levittan, *supra* note 17, at 630.

58. W. SCHAEFER, *supra* note 11, at 9.

59. Not a few of the post-*Miranda* generation may be incredulous that the admissibility of "volunteered" statements was ever in doubt. But it was—until the Court shifted from the "prime suspect"—"focal point"—"accusatory state" test(s) of *Escobedo v. Illinois*, 378 U.S. 478 (1964), to the "custodial interrogation" standard of *Miranda*, or, to characterize it another way, moved from a right to counsel base in *Escobedo* to a self-incrimination base in *Miranda*. See generally Kamisar, *supra* note 33, at 338-51.

Justice White had cause to protest in *Escobedo*:

At the very least the Court holds that once the accused becomes a suspect and, presumably, is arrested, any admission made to the police thereafter is inadmissible in evidence unless the accused has waived his right to counsel. The decision is thus another major step in the direction of the goal which the Court seemingly has in mind—to bar from evidence all admissions obtained from an individual suspected of crime, whether involuntarily made or not.

378 U.S. at 495 (dissenting opinion, joined by Clark & Stewart, JJ.). See also the then justified doubts and fears voiced in Enker & Elsen, *Counsel for the Suspect: Messiah v. United States and Escobedo v. Illinois*, 49 MINN. L. REV. 47, 60-61, 69, 83 (1964) (Court may be in process of shaping "a novel right not to confess except knowingly and with the tactical assistance of counsel"), and, on the eve of *Miranda*, in Traynor, *supra* note 7, at 669-73.

questioning”⁶⁰ or “other general questioning of citizens,”⁶¹ even though the citizen was both uninformed and unaware of his rights; and, even when the proceedings moved to the station house, and police interrogators were admittedly bent on eliciting incriminating statements from the prime suspect, it allowed them to obtain waivers of the privilege and the assistance of counsel *without the advice or presence of counsel, without the advice or presence of a judicial officer, and evidently without any objective recordation of the proceedings*.⁶² And yet one heard the question after *Miranda*, “Are confessions dead?”

It may be that in the midst of the “raging controversial process” of redetermining the conformity of our criminal procedure to our ideals,⁶³ the *Miranda* Court thought it prudent to reserve amplification and reinforcement of the *Miranda* plan for another day,⁶⁴ underestimating the risk that there might not be another day. It may well be that at the time it was impossible to persuade a majority of the Court to go an inch further than it did. Moreover, whether

On digesting *Miranda*, James R. Thompson, who had the distinction of making the losing argument in *Escobedo* (but who, I venture to say, made the best argument any lawyer could have made for the State of Illinois), asked: “While the court holds that the police need not stop the person who volunteers information (and presumably holds that the warnings need not be given to such people), does not this concession, while it assumes the statement to be voluntary, fail to take account of the fact that a statement may be volunteered in ignorance of the privilege against self-incrimination and ‘of the consequences of foregoing it?’” Thompson, *supra* note 27, at 422 (footnote omitted). The Court’s answer, I take it, would be that (at this state of the criminal process, at least) the privilege does not protect a person from *unintentionally* incriminating himself but only from being *compelled* to incriminate himself. See *Hoffa v. United States*, 385 U.S. 293, 303-04 (1966). Cf. *Graham*, *supra* note 33, at 76-77.

Moreover, absent interrogation the coercion of arrest and detention does not rise to the level of “compulsion” within the meaning of the privilege. Thus, as Justice White points out in his *Miranda* dissent, a suspect “may blurt out [an admissible] confession despite the fact that he is alone and in custody, without any showing that he had any notion of his right to remain silent or of the consequences of his admission.” *Miranda v. Arizona*, 384 U.S. 436, 533 (1966). But see MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 120.8 (Proposed Official Draft No. 1, 1972); *id.* § 130.1 (Tent. Draft No. 6, 1974); UNIFORM RULES OF CRIMINAL PROCEDURE 212, 241 (Proposed Final Draft, 1974), recommending that, in order to relieve the suspect of some of the confusion and anxiety he may feel following arrest and arrival at the police station, he should be given certain advice at these stages *whether or not any questioning is attempted*.

60. *Miranda v. Arizona*, 384 U.S. 477 (1966).

61. 384 U.S. at 477.

62. See note 27 *supra*.

63. Breitell, *supra* note 17, at 1.

64. See, e.g., the suggested projection of the *Miranda* rationale in Thompson, *supra* note 27, at 421-22.

the Court should have explicitly required the police to make either tape or verbatim stenographic recordings of interrogations, thus adding fuel to the criticism that it was "legislating," is surely one of those "damned if it did" and "damned if it didn't" issues.

Nevertheless, I still believe, as I did before *Miranda*, that "[i]n the long run, no statute, court rule, or court decision pertaining to warnings or waivers will suffice—for the same reason that the flood of appellate opinions on 'involuntary' confessions have not sufficed—until police interrogation is stripped of its 'most unique feature . . . its characteristic secrecy.'"⁶⁵ The Kauper-Schaefer-Friendly proposal does something about this; *Miranda* does not.

5. *The questions shall be asked by police officers or prosecuting attorneys rather than the judicial officer, but only in the presence of the judicial officer, who may intervene to prevent abuse.*

While Kauper preferred interrogation by a magistrate (pp. 1246-47), this was not of vital concern to him. His main objective was a procedure for interrogation by or *under the supervision of* a judicial officer. He was aware of the arguments that "the prosecutor would be more adept in questioning prisoners" and that if the prosecutor were assigned this task "the magistrate would have less reason to lose his quality of judicial disinterestedness" (p. 1246). Such an alternative was acceptable to him, "provided that the plan were flexible enough to allow the magistrate to interrogate if the prosecutor were unable to be present . . . , for questioning loses much of its value unless it takes place immediately" (p. 1246). (Evidently Kauper balked at authorizing interrogation by the police of his time even in the presence of a magistrate.)

Today, at least, it seems preferable for law enforcement officers to conduct the inquiry. They are better trained and more practiced; they "will know what information is relevant and what direction that inquiries should take."⁶⁶ Moreover, "questioning by a judge tends to lapse into partisanship";⁶⁷ the risk would be much greater that the magistrate "might come to feel responsible for the successful outcome of the interrogation from a police point of view."⁶⁸

If *Miranda's* denial that the "Constitution necessarily requires adherence to any particular solution for the inherent compulsions

65. Kamisar, *supra* note 15, at 85-86, quoting Weisberg, *supra* note 52, at 179.

66. W. SCHAEFER, *supra* note 11, at 79.

67. Hofstadter & Levittan, *supra* note 17, at 635.

68. W. SCHAEFER, *supra* note 11, at 80. See also Note, *supra* note 17, at 446.

of the interrogation process as it is presently conducted"⁶⁹ is to be taken seriously, the Kauper-Schaefer-Friendly model presents a real alternative. Although the constitutional problems posed by comment at trial upon the suspect's silence during the judicially supervised examination are formidable, they may not be insurmountable.⁷⁰ It

69. 384 U.S. at 467.

70. One may agree that even so mild a "compulsion" as comment upon failure to testify should not be exerted on a defendant to take the stand at trial "so long as the prosecution may bring out an entire criminal history, including crimes unrelated to that with which he is charged and having no real tendency to reflect on his veracity," Friendly, *supra* note 11, at 699, yet find such "compulsion" tolerable at the judicially supervised interrogation, where no jury sits to be prejudiced by "other crimes" evidence. Cf. Breitell, *supra* note 17, at 6-7. The fears that a defendant's demeanor on the witness stand might do his cause a fatal disservice or that unfair cross-examination might induce an innocent defendant to give an appearance of guilt seem exaggerated. See, e.g., W. SCHAEFER, *supra* note 11, at 66-67; Note, *supra* note 17, at 447. But in any event, comment on refusal to speak at the judicially supervised interrogation will not pressure a defendant to exhibit his nervousness, confusion, and embarrassment before the ultimate triers of fact. Six years ago it seemed "unrealistic" to expect "the present Court" to draw a distinction between comment on failure to testify at trial and refusal to respond before a magistrate, Friendly, *supra*, at 713 n.180, but "the present Court" no longer sits. The two *Griffin* dissenters (Stewart and White) still do, along with four new members. Cf. Friendly, *Time and Tide in the Supreme Court*, 2 CONN. L. REV. 213, 219-20 (1969).

Presumably, under the Kauper-Schaefer-Friendly plan a defendant would be allowed to take the stand for the limited purpose of explaining away his silence before the magistrate. Opposition to trial comment on a defendant's refusal to respond before the magistrate might be further reduced if the trial judge had to determine the admissibility of the silence as evidence of a feeling of guilt in light of the external circumstances surrounding the alleged guilt and the defendant's personal traits. Opposition might also lessen if the defendant were permitted, prior to the ruling on admissibility, to offer evidence explaining his silence for reasons other than guilt. Cf. *Developments in the Law—Confessions*, 79 HARV. L. REV. 938, 1039 (1966).

If it turns out that comment on refusal to respond before a magistrate is constitutionally barred, another route may be available. "A tremendous proportion of defendants" do testify at trial, especially when they have no criminal records. Friendly, *supra*, at 700, relying, *inter alia*, on H. KALVEN & H. ZEISEL, *THE AMERICAN JURY* 137, 146 (1966). Sufficient pressure might be exerted on a defendant to speak at the judicial examination if his refusal to speak were to be used for impeachment purposes if and when he took the stand at trial. This route, too, is not clear of constitutional obstacles. Perhaps a more formidable barrier than even *Miranda* or *Griffin* is *Grunewald v. United States*, 353 U.S. 391 (1957), holding that a defendant's refusal to answer grand jury questions on fifth amendment grounds cannot be used to impeach his later trial testimony. *But cf.* *Harris v. New York*, 401 U.S. 222 (1971), discussed in note 27 *supra*. Although the Court drew upon its supervisory power over the administration of federal criminal justice in *Grunewald*, it felt justified in passing on a question "usually within the discretion of the trial judge" because "such evidentiary matter has grave constitutional overtones." 353 U.S. at 423-24. The Court, however, declined to reexamine *Raffel v. United States*, 271 U.S. 494 (1926), permitting the defendant's failure to take the stand at his first trial to be used for impeachment purposes when he testified at his second trial. *Grunewald* distinguished grand jury and other "secret proceedings," where a person testifies without the advice of counsel or other procedural safeguards, from "open court proceedings." 353 U.S. at 422-23. Arguably (although I would not like to have to make the argument), judicially supervised interrogation under the Kauper-Schaefer-

would be somewhat ironic if the comment provision cannot pass constitutional muster, for it is not at all clear that such a provision

Friendly plan might be viewed as more akin to a trial situation than to grand jury or other "secret proceedings."

Judges Friendly and Schaefer seem resigned to the fact that their plan would require a constitutional amendment. See note 22 *supra*. Whether or not the arguments suggested above have persuaded anyone else that constitutional amendment is unnecessary, they have not convinced me. But these arguments should not be dismissed lightly. A state statute authorizing comment on refusal to respond before a magistrate (or the use of such refusal for impeachment purposes) in the context of the Kauper-Schaefer-Friendly plan might well pass constitutional muster. "[T]he fully formal action of a state legislature [as opposed to the informal, extralegal practices of the police] has a considerable weight; it represents the best and most authentic judgment of the state as a political body." C. BLACK, *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* 87-88 (1969). An even stronger case, of course, can be made if the Kauper-Schaefer-Friendly plan is enacted by the Congress under its section five power to enforce the fourteenth amendment. See C. BLACK, *supra*, at 88-93 (viewing the complete neglect of the problem by the legislative branch as "what is most fundamentally wrong with such situations as those [*Miranda*] set out to correct," and maintaining that the "Court would very seriously respect and in large measure defer to" a good-faith effort to deal with the problem by Congress under its section five power); Burt, *Miranda and Title II: A Morganatic Marriage*, 1969 SUP. CT. REV. 81, 123-34 (extraordinarily skillful, though at times highly strained, "suggested reading" of Title II of the Crime Control Act of 1968, 18 U.S.C. § 3501 (1970)—a purported "repeal" of *Miranda*—"to fit it into the mold" of *Katzenbach v. Morgan*, 384 U.S. 641 (1966); Professor Burt's discussion would apply a fortiori to a Congressional enactment under section five of the Kauper-Schaefer-Friendly plan, which—unlike Title II, I submit, Professor Burt's heroic undertaking to the contrary notwithstanding—certainly would achieve *Miranda*'s "general protective purposes"). See also C. BLACK, *PERSPECTIVES IN CONSTITUTIONAL LAW* 106-07 (rev. ed. 1969); Cox, *Constitutional Adjudications and the Promotion of Human Rights*, 80 HARV. L. REV. 91, 106 n.86, 108 (1966); Kurland, Book Review, 34 U. CHI. L. REV. 704, 709 (1967).

Although the Kauper-Schaefer-Friendly plan merits the most serious consideration, I submit that the same cannot be said for either the constitutionality or the desirability of a rule permitting a suspect's silence during secret, unsupervised police interrogation (evidently allowed by *Miranda*) to be used to impeach his trial testimony. Compare *United States ex rel. Burt v. New Jersey*, 475 F.2d 234 (3d Cir.), cert. denied, 414 U.S. 938 (1973) (Douglas, Brennan & Marshall, JJ., dissenting), with *Johnson v. Patterson*, 475 F.2d 1066 (10th Cir.), cert. denied, 414 U.S. 878 (1973), and *United States v. Hale*, 498 F.2d 1038 (D.C. Cir.), cert. granted, 43 U.S.L.W. 3325 (U.S. Dec. 9, 1974) (No. 74-364). For one thing, *Grunewald* would seem to apply a fortiori. See 87 HARV. L. REV. 882, 885-86 (1974). For another, even if he were allowed to do so, the suspect's subsequent efforts to explain that his silence was attributable to any one of a variety of causes, ranging from not hearing or misunderstanding the officer to fear of reprisals from others, see Traynor, *supra* note 7, at 26, would trigger still another "swearing contest" (e.g., the suspect insisting that he was frightened and bewildered at the interrogation but the officer maintaining that he looked and acted calm and collected). Moreover, the idea that the accused's silence during police interrogation could be used against him at trial is currently being raised in the context of the familiar *Miranda* warnings; "it would be grossly unfair to advise an accused simply that he had 'a right to remain silent,' and then use his silence against him at trial without at the very least having also informed him that if he chooses to exercise his right he may subsequently be impeached by that fact." *United States v. Hale*, 498 F.2d 1038, 1044 (D.C. Cir.), cert. granted, 43 U.S.L.W. 3325 (U.S. Dec. 9, 1974) (No. 74-364).

The *Miranda* warnings could, of course, be revised prospectively, cf. CRIMINAL

would put more pressure on a suspect to talk than does the present system.

Miranda recognizes that many suspects will assume that "silence in the face of accusation is itself damning and will bode ill when presented to a jury"⁷¹ (and especially, one might add, when presented to a police officer or prosecutor). It also informs trial judges and prosecutors that a suspect's "[standing] mute or claim[ing] his privilege in the face of accusation" may not be used against him at trial.⁷² But it nowhere requires that a law enforcement officer *advise a suspect* to this effect.⁷³ "[W]hat a suspect is going to ask himself most urgently at the police station is: 'How do I get out of this mess and avoid looking guilty?'"⁷⁴ How, indeed?

How did he get out of, or try to get out of, every other "mess" in his life? As a child did he remain silent when accused by an angry parent or did he try to talk his way out of it? As an adult did he remain silent when confronted by a disgruntled employer or a suspicious spouse or did he try to talk his way out of it? Absent

LAW REVISION COMMITTEE [Gr. Br.], ELEVENTH REPORT, EVIDENCE (GENERAL) 16-34 (1972), proposing that adverse inferences may be drawn from a suspect's silence when interrogated, and that the Judges' Rules be modified accordingly. However, such a revision might only aggravate existing problems. Can a police officer be trusted to explain to a suspect how he can have "a right to remain silent" and still have his silence used against him at trial? And even if an officer does his very best to explain, can the average suspect be expected to understand? The available empirical data indicate that a large number of police officers do not give the silence or counsel warnings at all, and many who do not give them in a meaningful way; moreover, a significant percentage of suspects either misunderstand the existing warnings or fail to appreciate their significance. See, e.g., Leiken, *Police Interrogation in Colorado: The Implementation of Miranda*, 47 DENVER L.J. 1, 15-16, 33 (1970); Medalie, Zeitz & Alexander, *Custodial Interrogation in Our Nation's Capitol: The Attempt To Implement Miranda*, 66 MICH. L. REV. 1347, 1375 (1969); Project, *Interrogations in New Haven: The Impact of Miranda*, 76 YALE L.J. 1519, 1550-54, 1571-72, 1613-15 (1967). In this light, how can anyone seriously suggest that we make the *Miranda* warnings significantly more complicated, yet continue to rely on the uncorroborated oral testimony of the police officer to establish the legality of the questioning?

71. 384 U.S. at 468.

72. 384 U.S. at 468 n.37.

73. It is not at all clear that a law enforcement officer can advise a suspect with perfect honesty that his silence will not be used against him. It is doubtful that police or prosecutors can, or should, eliminate a suspect's silence from their minds. See Elsen & Rosett, *supra* note 53, at 655 (both authors are former federal prosecuting attorneys); LaFave, *supra* note 33, at 106-09. At the time of *Miranda*, however, and at least in the immediately succeeding years (complications may now be setting in, see note 27 *supra*), an officer could with complete honesty inform a suspect that his silence may not be used against him *at trial*. One can only speculate whether *Miranda's* failure to require the police to issue such a warning was a mere oversight or a policy decision not to stiffen further some suspects' resistance to talk.

74. Elsen & Rosett, *supra* note 53, at 654.

adequate assurances on this point, is a suspect going to risk "looking guilty" by standing on his rights or is he going to proceed on the assumptions and habits of a lifetime?

Supplementing the present warnings might help some, but can any set of warnings help enough? If, as *Miranda* assumes with good reason, "a once-stated warning [that a suspect has a right to remain silent], delivered by those who will conduct the interrogation, cannot itself suffice" to guarantee that "the individual's right to choose between silence and speech remains unfettered throughout the interrogation process,"⁷⁵ it is not readily apparent why a "once-stated warning" that a suspect has a right to remain silent *and* a right to the presence of counsel is supposed to suffice. It is unclear why this or any other series of warnings cannot also "be swiftly overcome by the secret interrogation process."⁷⁶ For, "if a choice made with respect to the question of whether or not to cooperate with the police cannot be voluntary if one is confronted with it by the police without the guidance of counsel, how can the choice to dispense with counsel be voluntary in the same circumstances? And won't it be precisely the persons who are most likely to be 'compelled' to cooperate by the subtle coercion of custody who will be 'compelled' by the same subtle coercion to waive the right to counsel itself?"⁷⁷

Police-issued warnings may mitigate—but cannot be expected to dispel fully—"the compulsion inherent in custodial surroundings,"⁷⁸ certainly not when, as apparently is often the case, such warnings are delivered in a tone and manner that geld them of much of their meaning or are accompanied by "hedging" that undermines their purpose.⁷⁹ Thus, borrowing language from *Miranda*, one may forcefully contend that "as a practical matter, the compulsion to speak in the isolated setting of a police station," even when supposedly offset by warnings, may still be "greater than in courts or other official investigations"—or at a judicially supervised interrogation—

75. 384 U.S. at 469.

76. "Prosecutors themselves claim that the admonishment of the right to remain silent without more 'will benefit only the recidivist and the professional.' . . . Even preliminary advice given to the accused by his own attorney can be swiftly overcome by the secret interrogation process." 384 U.S. at 470, *quoting* Brief for the Natl. District Attorneys Assn. as amicus curiae.

77. MODEL CODE OF PRE-ARREST PROCEDURE, Commentary at 40 (Study Draft No. 1, 1968).

78. "Unless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice." 384 U.S. at 458.

79. Project, *supra* note 70, at 1551-52, 1571-72, 1614-15.

where there are "impartial observers to guard against intimidation or trickery."⁸⁰

Assuming arguendo that the comment on the suspect's silence authorized by the Kauper-Schaefer-Friendly plan exerts significantly greater "compulsion" to speak than that allowed to operate under *Miranda*—the informal pressure to "avoid looking guilty" when confronted by anyone in authority under any circumstances and the additional "compulsion" inherent in police custodial surroundings—the comment feature should not be judged and condemned in a vacuum. It is only a small part of an attractive package whose provisions for judicial warnings, judicial supervision of any ensuing interrogation, and objective recording of the entire proceeding seem inherently stronger than the *Miranda* requirements, at least as the latter have generally been applied. Not only does the Kauper-Schaefer-Friendly model go a considerable distance toward investing the interrogation proceedings with the "protective openness and formalities of a court trial,"⁸¹ but it "tend[s] to promote the speedy production of the suspect before a magistrate,"⁸² offers "the most efficient way of providing legal counsel upon arrest,"⁸³ and "meets the equal protection argument; the rich man and the professional criminal could no longer remain silent without adverse consequences."⁸⁴

For purposes of these remarks, however, the relative merits of the Kauper and *Miranda* models are really beside the point. The point is that two of the most thoughtful judges and legal commentators of our time—two of the leading participants in "a massive re-examination of criminal law enforcement procedures on a scale never before witnessed"⁸⁵—in effect returned to and built upon the

80. 384 U.S. at 461.

81. Traynor, *supra* note 7, at 676.

82. Friendly, *supra* note 11, at 713.

83. As a result of the District of Columbia experience, the Junior Bar "recommended 'that the most efficient way of providing legal counsel upon arrest would be in connection with a prompt presentment before a committing magistrate, available at a downtown location on a 24-hour basis.'" Medalie, Zeitz & Alexander, *supra* note 70, at 1398.

84. Friendly, *supra* note 11, at 713-14.

85. *Miranda v. Arizona*, 384 U.S. 436, 523 (1966) (Harlan, Stewart & White, JJ., dissenting) (referring, *inter alia*, to the American Bar Association's project on *Standards for Criminal Justice* and the American Law Institute's *Model Code of Pre-Arraignment Procedure* project).

Judge Friendly and Justice Schaefer played major roles in the Model Code project, as members of the project's Advisory Committee and the Institute's Council, ever since the project was launched in the spring of 1965. Justice Schaefer was also Chairman of the ABA project's Advisory Committee on the Criminal Trial, which

Kauper proposal. What more can one say about a forty-year-old article, written in the most explosive field of the law before the first explosion was heard? What more can one say of the man who wrote it as a third-year law student?

prepared four reports between 1964 and 1968. Judge Friendly's *The Bill of Rights as a Code of Criminal Procedure*, 53 CALIF. L. REV. 929 (1965), not only served as a rallying point for critics of the Warren Court's work in the criminal procedure field, but shook (or should have shaken) the Court's warmest admirers.